

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 15, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP2498-FT

Cir. Ct. No. 2004CV398

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

RSIDUE, LLC,

PLAINTIFF-RESPONDENT,

V.

KAYLEEN J. KADUCE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County:
PAUL J. LENZ, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Kayleen Kaduce appeals an order granting Rsidue, LLC’s motion for relief from an order awarding attorney fees.¹ Kaduce argues the circuit court erred by vacating the attorney fee award based on its interpretation of a letter agreement. Specifically, Kaduce contends the court erred by resolving what it must have construed as an ambiguity without taking evidence. We agree and, therefore, reverse the order and remand the matter to the circuit court with directions to conduct further proceedings.

BACKGROUND

¶2 Rsidue purchased Kaduce’s overdue credit card account and, in June 2004, brought an action to collect the amount due on it. Kaduce filed a motion to dismiss on grounds that Rsidue had failed to state a claim upon which relief could be granted. Specifically, Kaduce argued that Rsidue failed to comply with the pleading requirements of the Wisconsin Consumer Act. *See* WIS. STAT. § 425.109. Rsidue countered that as an assignee, it was not a “creditor” within the meaning of the WCA and, therefore, not subject to the WCA’s pleading requirements. In June 2005, the circuit court rejected Rsidue’s arguments, granted Kaduce’s motion to dismiss and retained jurisdiction to award attorney fees. In December 2005, the circuit court entered an order awarding \$3,500 in attorney fees and costs to Kaduce.

¶3 At the time the attorney fee award was entered, the case of *Rsidue, LLC v. Michaud*, 2006 WI App 164, 295 Wis. 2d 585, 721 N.W.2d 718, was pending in this court. *Michaud* involved a determination whether an assignee was

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

a creditor and, thus, subject to the WCA's pleading requirements. In a letter dated December 20, 2005, Kaduce agreed "to not take any action (including docketing) to enforce [the attorney fee] order until the Court of Appeals rules in the *Michaud* case." In July 2006, the *Michaud* court ruled assignees were not "creditors" subject to the WCA's pleading requirements. After the *Michaud* decision was released, Kaduce docketed the order awarding attorney fees and requested payment of those fees. Rsidue filed a WIS. STAT. § 806.07 motion for relief from the order awarding attorney fees. Although Kaduce challenged the timeliness and merits of Rsidue's motion for relief, the circuit court did not rule on these issues but, rather, focused on what it construed as Kaduce's agreement to be bound by the *Michaud* decision. The circuit court consequently granted the motion for relief and vacated the order awarding attorney fees. This appeal follows.

DISCUSSION

¶4 Kaduce argues that the circuit court erred by vacating the attorney fee award based on its interpretation of the December 20, 2005 letter agreement. The objective in construing a contract is to ascertain the parties' intent from the contractual language. *Waukesha Concrete Prods. Co. v. Capitol Indem. Corp.*, 127 Wis. 2d 332, 339, 379 N.W.2d 333 (Ct. App. 1985). If the contract is plain and unambiguous, the contract is construed according to its plain meaning, even though a party may have construed it differently. *Id.* A contract with two reasonable interpretations is ambiguous. *Central Auto Co.*, 87 Wis. 2d 9, 19, 273 N.W.2d 360 (Ct. App. 1978). Whether a contract is ambiguous is a question of law that this court reviews independently. *Energy Complexes, Inc. v. Eau Claire County*, 152 Wis. 2d 453, 467, 449 N.W.2d 35 (1989). If a contract is ambiguous, thus requiring resort to extrinsic evidence to determine the parties' intent, *see Jones v. Jenkins*, 88 Wis. 2d 712, 722, 277 N.W.2d 815 (1979), the circuit court,

not the appellate court, must make the factual determination and resolve the ambiguity. *Spencer v. Spencer*, 140 Wis. 2d 447, 450, 410 N.W.2d 629 (Ct. App. 1987).

¶5 Although the court here concluded that Kaduce agreed to be bound by the decision in *Michaud*, the letter merely stated that Kaduce would not enforce the attorney fee award until *Michaud* was decided. Kaduce thus claims the letter evinces her willingness to delay enforcement of the award pending resolution of *Michaud*, not an agreement to forego enforcement altogether depending on what the *Michaud* decision said. Because the letter can reasonably be construed as either a simple forbearance or an agreement to be bound by *Michaud*, we conclude it is ambiguous. *Central Auto Co.*, 87 Wis. 2d at 19.

¶6 Emphasizing that the court took no evidence at the hearing on Rsidue's motion, Kaduce argues there was no basis for the court to reach its conclusion. We agree. Because the agreement is ambiguous, the circuit court should take extrinsic evidence to resolve the ambiguity. *See Jones*, 88 Wis. 2d at 722. We therefore reverse the order vacating the attorney fee award and remand the matter to the circuit court with directions to take evidence in order to resolve the ambiguity.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

